Ling Chick Ngai & Anor v Scott & English (M) Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–33 OF 2005–III
DAVID WONG JC
26 FEBRUARY 2007

Civil Procedure — Stay of execution pending appeal — Pending application for leave to appeal to the Court of Appeal — Appeal is pending — Damage to reputation — Inability to pay judgment sum — Whether constitutes special circumstances

This was an application by the appellant for a stay of execution pending an application for leave to appeal to the Court of Appeal of the decision of the High Court, where the appellant's appeal against the sessions court judge's decision was dismissed with costs. The judgment sum was for RM129,200.

Held, dismissing application with costs to be taxed:

The fact that an appeal is pending does not operate as a stay of execution. There was no appeal but only an application for leave to appeal. The plea of damage to reputation was nothing but 'a fear of losing' and was not within the definition of 'special circumstances': *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 followed. The fact that the appellant could not pay the judgment sum could not also be regarded as 'special circumstances': *Zasalim Development Sdn Bhd v Lum Siew & Sons Sdn Bhd* [2002] 7 MLJ 119 and *RHB Bank Ltd v FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 4 MLJ 86 referred (see para 8–10).

[Bahasa Malaysia summary

Ini adalah permohonan oleh perayu untuk penangguhan pelaksanaan sementara permohonan untuk kebenaran merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi, yang mana rayuan perayu terhadap keputusan hakim mahkamah sesyen ditolak dengan kos. Jumlah penghakiman adalah RM129,200.

Diputuskan, permohonan ditolak dengan kos untuk ditaksirkan:

Hakikat bahawa suatu rayuan masih belum selesai tidak berfungsi sebagai penangguhan pelaksanaan. Ianya bukan rayuan tetapi hanya permohonan untuk kebenaran merayu. Rayuan berhubung reputasi yang terjejas adalah 'takut kerugian' yang tiada di dalam definasi 'keadaan istimewa': *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 diikut. Keadaan di mana perayu tidak dapat membayar jumlah penghakiman juga tidak boleh dianggap sebagai 'keadaan

istimewa': *Zasalim Development Sdn Bhd v Lum Siew & Sons Sdn Bhd* [2002] 7 MLJ 119 and *RHB Bank Ltd v FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 4 MLJ 86 dirujuk (lihat perenggan 8–10).]

Notes

For cases on Stay of execution pending appeal, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2391–2395.

Cases referred to

Annot Lyle, The [1886] 11 PD 114 (refd)

Kosma Palm Oil Mills Sdn Bhd v 20 Korporasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)

RHB Bank Ltd v FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 4 MLJ 86 (refd)

Zasalim Development Sdn Bhd v Lum Siew & Sons Sdn Bhd [2002] 7 MLJ 119 (refd)

Appeal from: Summons No 52–21 of 2002–III (Kuching Session Court)

Albert Tang (Gordon Tang with him) (Chew Jugah Ullok & Co) for the appellant.
Susan Gau (Chan & Gan) for the respondent.

David Wong JC:

INTRODUCTION

[1] Before me is an application (encl 8) by the appellant for a stay of execution pending an application for leave to appeal to the Court of Appeal of the decision handed down by this court on 11 July 2006, where the appellant's appeal against the sessions court judge's decision on 28 October 2005 was dismissed with costs.

[2] Enclosure 8 is supported by an affidavit dated 24 January 2006 of the defendant. The judgment sum of RM129,200 was in respect of a sale of one new Cummins Diesel Generator set model NTA855GC4.

LAW

[3] The principle of law applicable for an application of this nature, is now settled by the Federal Court judgment in *Kosma Palm Oil Mills Sdn Bhd v 20 Korporasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 ('*Kosma* case') where the Federal Court reconfirmed that the 'special circumstances' test as the law in this country.

[4] I reproduce the relevant paragraphs of the judgment of Augustine Paul JCA at pp 263–264:

A The general rule is that an appeal shall not operate as a stay of execution unless the Court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 while commenting on the discretion to grant a stay:

> But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show
B special circumstances to justify it...

The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well established in this country.See, for example, the Federal Court cases of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill*
C *(Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 CLJ 701; [1995] 2 MLJ 105 and *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119 …

... With regard to the specific factors that constitute special circumstances I refer again to *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and Another Case* [1993] 4
D CLJ 98; [1993] 3 MLJ 514 where Ian Chin JC (as he then was) said at p 101:

> What, then, constitute special circumstances? It was said in *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126, at p 127, that:

E One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case... It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most
F common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established.

G GROUNDS OF THIS APPLICATION

[5] They can be summarized as follows:

(1) there is a pending application for leave to appeal to the Court of Appeal;

(2) the appellant is 72 years old and did not benefit from the transaction;
H

(3) the appellant is not in a position to pay; and

(4) there is merit in the appeal.

[6] The Federal Court in *Kosma*'s case approached an application of this nature in
I the following way:

> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406). Where it is alleged that there is a danger of

the unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the insolvency of the other party, this must be shown in the affidavit (see *The Annot Lyle* [1886] 11 PD 114).

[7] I shall now deal with the appellant's four grounds:

First Ground — Pending an application for leave to appeal

[8] The fact that an appeal is pending does not operate as a stay of execution. This is trite law. In the present case, there is no appeal but only an application for leave to appeal.

Second & Third Grounds — For these grounds, the defendant states as follows

(a) I did not make any monetary or material gains of any kind out of this transaction as the generator set was burnt in an accident.

(b) I am unable to satisfy the judgment sums as I have little means and I also do not own any landed property that I could dispose to satisfy the judgment sum.

(c) I also do not own any immovable property of value apart from my personal and household effects.

(d) I am currently 73 years old and contemplating to retire soon.

(e) If the respondent/plaintiff were to commence bankruptcy proceedings against me, my lifetime's reputation in society would irreparable damaged. My reputation included:

(i) Former Vice President (1986–2002) and current Honorary Vice President of the World Lin's Association.

(ii) Former Chairman (1987–1990) and current Permanent Honorary Chairman of United Limitation Ordinance's Association of Sarawak;

(iii) Former Chairman (1987–2005) and current Permanent Honorary Chairman of Sarawak Si Ho (Limitation Ordinance Clan) Association;

(iv) Former Chairman (1985–2003) and current Permanent Honorary Chairman of Sarawak Electrical Association;

(v) Current chairman President of China Wei Hui Bi Gans Commemoration Organization (1993–2005).

[9] The issue which confronts me now is whether the appellant's listed factors in his affidavit amount to special circumstances. The plea of damage to reputation in my view is nothing but 'a fear of losing' and it had been held by the Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 to be not within the definition of 'special circumstances'. This is what the court said at p 70:

The grounds relied on by the appellant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound

> up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt. … Whatever it is, those factors are not 'special circumstances' … nor do they show that the appeal, if successful, will be rendered nugatory.... They are nothing unusual. Execution is a natural process after obtaining judgment...

[10] Further the fact that the appellant could not pay the judgment sum cannot be regarded as special circumstances (see *Zasalim Development Sdn Bhd v Lum Siew & Sons Sdn Bhd* [2002] 7 MLJ 119 and *RHB Bank Ltd v FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 4 MLJ 86).

Fourth Ground — Reasonable chance of success in the appellant's appeal

[11] Mr Albert Tang spent five pages of his submission contending that there is merit in the appellant's appeal and urged me to take it into consideration for the purpose of this application. As much as I like to engage with him in a discussion on his submission, I am not permitted to do so as the merit of an appeal is no longer a relevant factor to be considered in a stay application On this point, Augustine Paul FCJ in *Kosma*'s case said:

> … both parties delved into some length on the merits of their respective case in the affidavits filed and the submission made in court. The merits of a party's case in a stay application are not a relevant matter for consideration.

[12] Accordingly, I dismiss encl 8 with costs to be taxed unless agreed to the respondent.

Application dismissed with costs to be taxed.

Reported by Peter Ling